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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 132

ROBERT AQUILINO AND JOSEPH SPERO, DOING BUSINESS AS HOME MAINTENANCE COMPANY, AND COLONIAL SAND AND STONE CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ADA BOTTONE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the New York Supreme Court, Special Term (R. 76–78), is not officially reported. The opinion of the New York Supreme Court, Appellate Division, Second Department (R. 91–94), is reported at 2 App. Div. 2d 747. The opinion of the Court of Appeals of the State of New York (Pet. 18–23) is reported at 3 N. Y. 2d 511.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on December 5, 1957. (Pet. 24.) A motion for rehearing was denied on April 3, 1958. (Pet. 28–29.) The petition for a writ of certiorari was filed on June 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTION PRESENTED

Whether a federal tax lien, prior in time to adverse mechanics' liens, is entitled to be first paid from a balance due a taxpayer-contractor.

STATUTES INVOLVED

Sections 3670, 3671, and 3672 (a) (1) of the Internal Revenue Code of 1939 and Sections 3, 4, 36-a, and 75, of the New York Lien Law are set forth in the Appendix, *infra,* pp. 9–11.

STATEMENT

In December 1951 and March 1952, the Collector received assessment lists including assessments against the taxpayer, Fleetwood Paving Corporation, which have not been paid. Subsequently, the taxpayer, as general contractor, entered into an agreement with Ada Bottone to remodel a restaurant that she owned. In August and September of the same year, taxpayer arranged for the petitioners, Home Maintenance Com-

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pany and Colonial Sand and Stone Company, to furnish labor and materials for the remodeling job. (Pet. 18.)

On October 31, 1952, the United States filed notice of its lien against the taxpayer for its unpaid taxes (amounting on that date, with penalties and interest, to over $5,000) in the office of the Clerk of the City of Mt. Vernon, where the taxpayer maintained its place of business. (Pet. 18.)

Some days later, having been paid only a part of what was due to them, petitioners filed mechanics' liens in the Clerk's office against the Bottone property for the balance owing, the former for $1,400, the latter for $896.25. In January 1953, Colonial Sand obtained a judgment for $2,109.43 for materials sold on a number of taxpayer's jobs. (Pet. 18.)

In June 1953, separate suits were started by petitioners to foreclose their respective liens, and Bottone, the owner, deposited $2,200, the amount still owing by her to the taxpayer, Fleetwood, with the Clerk of the County Court to the credit of both actions. On Bottone's motion, the Government, which had levied against her indebtedness to taxpayer, Fleetwood, was interpleaded and substituted as defendant in her place. (Pet. 18–19.)

Each of the three parties moved for summary judgment, and the trial court granted the petitioners' motions, awarding their liens priority on the ground that the Government's tax lien was ineffective since it had

not been filed in the County Clerk's office, the place designated by statute for the recording of liens against real property. Although the Appellate Division affirmed the judgment, it disagreed with the lower court's rationale. It was the Appellate Division's view that no debt was due from Bottone, the owner, to Fleetwood to which the Government's lien could attach; that the fund deposited by Bottone was a substitute for her real property and, since the United States had no lien against such property, it had no lien (2 App. Div. 2d 747) "upon the funds deposited in substitution therefor." (Pet. 19.)

The Court of Appeals of the State of New York reversed on the ground that the Government's notice of lien, concededly filed before the petitioners filed their notice, was asserted against Bottone's indebtedness to the taxpayer, and not against any real property; that this indebtedness was "quite obviously within the statutory terms personal 'property and rights to [such] property' belonging to the taxpayer" (26 U. S. C. 3670); that the federal lien, having been properly recorded, is superior to any other lien subsequently filed; "that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land"; and that the New York Lien Law, providing that funds received by a contractor from the owner for the improvement of real property shall be deemed "trust funds" for the payment of subcontractors, "may not be construed to affect the rights of the government or the priority of its tax lien." (Pet. 21–22.)

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ARGUMENT

Involved here is a federal lien which arose even before petitioners' subcontracts with the taxpayer and which was recorded before petitioners' liens were recorded.[1] Under established principles, the court below—the highest court in the State of New York—was clearly correct in according priority to the federal lien. There is no conflict and no other reason for further review.

1. Section 3670 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 9) imposes a lien "in favor of the United States upon all property and *rights to property*, whether real or *personal*," belonging to the delinquent taxpayer. (Emphasis added.) The New York Court of Appeals found, according to the undisputed facts, that the owner of the improved real estate owed an existing contractual obligation to the taxpayer (Pet. 19, 21), which had fulfilled its obligations under their contract (R. 25–26, 32, 37),[2] and that this interest was a right to personal property within the meaning of Section 3670. The court further held that the federal lien, having been first in time, was entitled to priority. The decision thus is squarely in accord with the decisions in *United States* v. *Colotta*, 350 U. S. 808, reversing 224 Miss. 33, and

[1] One of the petitioners secured a judgment against the taxpayer, but that judgment was subsequent to the filing of the federal tax lien (Pet. 23) and therefore subordinate to it. Section 3672 (a) (1) of the 1939 Code (Appendix, *infra*, pp. 9–10).

[2] Compare *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, 241 F. 2d 142, 144–145 (C. A. 2d), discussed *infra*, pp. 7–8.

United States v. *Vorreiter,* 355 U. S. 15, reversing 134 Colo. 543. See also *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010, reversing 227 F. 2d 359 (C. A. 7th).

2. The question tendered by petitioners is not presented by this case. According to petitioners (Pet. 2), the question is "whether the general contractor's interest, solely as trustee, in the res of this statutorily-created trust constitutes 'property' or 'rights to property' under the federal tax lien law." Such a statement of the question presupposes that Bottone's indebtedness to the general contractor constitutes the "res" of a "trust" under the New York Lien Law (Appendix, *infra,* pp. 10–11) and that the general contractor's interest is "solely as trustee." Petitioners made that argument in the court below—the highest court in the State of New York—but it was squarely rejected. Instead, the court held that the indebtedness "quite obviously" was property "belonging to the taxpayer" (Pet. 21). And the court construed the New York Lien Law as simply establishing a rule of priority that did not affect the rights of the Government. In so holding, the court below (Pet. 22) expressly approved the "virtually indistinguishable" decision in *United States* v. *Kings County Iron Works,* 224 F. 2d 232, 235 (C. A. 2d), similarly denying that the "trust" provided by the statute divests the contractor of his property interest in his chose in action against the property owner.

In substance, petitioners contend that this construction of the New York Lien Law by the New York Court of Appeals is erroneous. This Court, however,

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has repeatedly adhered to the basic constitutional principle that "What the statutes of a State mean, the extent to which any provision may be limited by other Acts * * * are questions on which the highest court of the State has the final word." *Musser* v. *Utah,* 333 U. S. 95, 98. See also, *e. g., Speiser* v. *Randall,* No. 483, 1957 Term (slip opinion, p. 9, n. 7), decided by this Court on June 30, 1958. Moreover, if petitioners' interpretation of the state statute were adopted so as to defeat the prior federal lien, it would then be essential to consider the constitutionality of the statute thus construed; for "Obviously, the State cannot * * * impair the standing of the federal liens, without the consent of Congress." *United States* v. *New Britain,* 347 U. S. 81, 84.

3. Contrary to the petitioners' contention (Pet. 7, 15), the decision below is not in conflict with the decision in *Fidelity & Deposit Co.* v. *New York City Housing Auth.,* 241 F. 2d 142 (C. A. 2d). There, the taxpayer-contractor breached its contract with the owner—*i. e.,* a special provision requiring payment of the laborers and materialmen as a condition precedent to receipt of any part of the contract price—and New York law deprived it of any interest in the debt due by virtue of that contract; the Second Circuit accordingly held that the contractor had no right to which the federal lien could attach.[3] On that basis, the Second Circuit distinguished its decision in *United States* v. *Kings County Iron Works, supra,* which the court below characterized as "virtually indistinguish-

[3] To similar effect is the more recent decision of the court below in *Aetna Casualty & Surety Co.* v. *United States,* decided June 25, 1958.

able" from this case (Pet. 22). Here, as in *King County,* no such special contract provision was involved. Cf. this Court's decision in *United States* v. *Bess,* No. 395, 1957 Term (slip opinion, p. 4), decided June 9, 1958 ("§ 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law").

CONCLUSION

The decision below is correct. It is in accord with applicable decisions of this Court. There is no conflict. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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JULY 1958.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) [As amended by Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798] *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is author-

ized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

New York Lien Law (32 McKinney's Consolidated Laws of New York Annotated):

SEC. 3. *Mechanic's lien on real property*

A contractor, subcontractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. * * *

SEC. 4. *Extent of lien*

* * * If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agree price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

New York Lien Law (32 McKinney's Consolidated Laws of New York Annotated, 1957 Cum. Pocket Part):

SEC. 36–a. *Contractor who diverts funds guilty of larceny; civil remedy to enforce trust*

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The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him.

SEC. 75. *Period of limitations*

No action to enforce a trust under this article shall be maintainable if commenced more than one year after completion of the improvement on account of which the claim arose.

U. S. GOVERNMENT PRINTING OFFICE: 1955